Supreme Court, U.S.
FILED
APR 23 1998
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No. 97-1599

In The Supreme Court of the United States

OCTOBER TERM 1997

LA QUETTA M. GOLDEN,

Petitioner,

v.

CITY OF GULFPORT, MISSISSIPPI, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming summary judgment on petitioner's Equal Pay Act claim that as Assistant City Attorney (Prosecutor) she should have been paid the same as Jim Halliday, a male Assistant City Attorney.

2. Whether the Court of Appeals erred in affirming summary judgment on petitioner's Title VII claim that her employment was terminated because of her race.

PARTIES TO THE PROCEEDING

The District Court, by Memorandum Opinion of January 27, 1995 and Order of February 16, 1995, dismissed petitioner's Title VII claims against the individual defendants in their individual capacities; Record 64-74; 96-97. On February 10, 1995, plaintiff filed an Amended complaint in response to the Court's Order; Record 76. Unlike the initial Complaint, which sued defendants Jenkins, Rose, Allen, Savant, and Dombrowski in their individual and official capacities, the Amended Complaint sued them in their official capacities only. Only defendants Combs and Hewes were still sued in their individual capacities. By Order of August 15, 1995, Record 279, the Court dismissed petitioner's claims against respondents Combs and Hewes in their individual capacities, except for Equal Pay claims. Petitioner did not address the issue of individual liability in her appeal to the Court of Appeals, but her Petition nonetheless lists all the individual respondents in their individual capacity.

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REASONS FOR DENYING THE WRIT

I. The Court of Appeals did not err in affirming summary judgment on petitioner's Equal Pay claim.

A. Plaintiff could not carry her burden of showing that she and Jim Halliday performed equal work requiring equal skill, effort, and responsibility.

Petitioner spent about 90 percent of her time in court, and ten percent on administrative duties. Exh. A, Golden Depos., Supp. Record 27, 28. Her court responsibilities were limited to misdemeanor cases in City and County Court. In petitioner's words, "[t]hey were not difficult trials." Exh. A, Golden Depos., Supp. Record 76. At trial, petitioner followed a checklist of questions and procedures developed by other prosecutors; Exh. J, DUI Prosecution Checklists, Supp. Record 150-159; Exh. A, Golden Depos., Supp. Record 59, 87, 88. Discovery was very limited; Exh. A, Golden Depos., Supp. Record 87; Exh. K, Uniform Rules of Procedure in Mississippi Municipal Courts, Supp. Record 160-164. Respondents' discovery requests were generally handled by the Court Clerks, and the prosecutors used form requests. Exh. A, Golden Depos., Supp. Record 82-86.

Petitioner handled no civil litigation. Exh. A, Golden Depos., Supp. Record 29. While petitioner spent 90 percent of her time in court, Jim Halliday spent about 60% of his time representing the City of Gulfport in civil suits in state and federal court. Exh. A, Golden Depos., Supp. Record 28; Halliday Affid., Record pp. 531-532. Mr. Halliday was responsible for complex litigation under a variety of statutes and Constitutional provisions. It required extensive investigation,

legal research, and use of all the discovery available under the Mississippi Rules of Civil Procedure and the Federal Rules of Civil Procedure. Trial preparation generally took years, and the amount of money at issue was usually in the millions. Halliday Affid., Record 531-532.

Apart from litigation, petitioner devoted the remaining ten percent of her time to administrative duties, consisting of interviewing, hiring, and orienting her secretary; assigning cases to prosecutors; visiting area schools; and conducting tours of City Hall. Exh. A, Golden Depos., Supp. Record 23-25. Mr. Halliday's non-litigation duties occupied about 40 percent of his time, compared to petitioner's 10 percent. He represented the City in its workers' compensation claims and in Civil Service proceedings. He drafted ordinances, and gave legal advice to the City's Risk Manager and to all the City's departments. He taught in the Police Academy. Halliday Affid., Record 531-532,; Exh. A, Golden Depos., Supp. Record 28. Petitioner performed none of these duties. Exh. A, Golden Depos., Supp. Record 29-30, 38.

In view of the substantial differences between their jobs, Petitioner cannot show that they were substantially equal. Instead, she claims that Mayor Combs "confirms that petitioner's job title was essentially the same as Halliday's title (Assistant City Attorney)". In the passage cited by petitioner, Mayor Combs said no such thing. He insisted that petitioner's title was "Assistant City Attorney (Prosecutor)" despite the best efforts of petitioner's counsel to get him to testify that her title, like Mr. Halliday's, was "Assistant City Attorney." Even if "Assistant City Attorney" were the same job title as "Assistant City Attorney (Prosecutor)" that would not excuse petitioner from carrying her burden of showing equal work; *see, e.g.*,

Christopher v. State of Iowa, 559 F.2d 1135 (8th Cir. 1977)("It is to be noted at the outset that the consideration of equal pay standards is based on actual job requirements and performance, and not on job classification or titles"). While petitioner asserts that her job description was "very similar" to that of Mr. Halliday, the descriptions do not appear in the record, and cannot carry her burden in any event; *see, e.g.*, *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 724 (5th Cir.1970)("As to the job descriptions, the Trial Judge was clearly correct to place her reliance elsewhere. The controlling factor under the Equal Pay Act is job content - the actual duties that the respective employees are called upon to perform").

Petitioner asserts that respondent Combs "admitted that Halliday's and Petitioner's skills were similar" and that they "possessed the same educational background." Even if this were true, "a prima facie case is not made by showing that the employees of opposite sex possess equivalent skills. The statute explicitly applies to jobs that require equal skills, and not to employees that possess equal skills. . . . The only comparison of skills that should be made in a prima facie case is a comparison of skills required by a job; *Hein v. Oregon College of Education*, 718 F.2d 910, 914 (9th Cir.1983); *see also, Waterman v. New York Telephone Company*, 102 Lab. Cas. ¶34,654, 1984 WL 1482 (S.D.N.Y. 1984)("Plaintiffs ... have not ... met their Rule 56(e) obligation by bringing to this Court's attention any affirmative indication that the jobs in question are equal or substantially equal. The argument that 'there is no indication' the training or experience of clerical instructors is 'in any way inferior to [that] of technical instructors' ... or that 'the courses in the 2000 series are in any way academically inferior to those in the other series' ... is simply beside the point"). Moreover, what Mayor Combs actually testified about skills

was,

> I'm not being flip, but we've got four attorneys sitting at the table here. And all of y'all have skills similar to Johnny Cochran and Shapiro, but I don't think any of y'all are making the kind of money they are. Naturally, if you're talking about two people that are attorneys and ask the question, are their skills similar, the answer is yes.

Combs Depos., Record 569.

B. Respondents have shown that the differential between petitioner's pay and that of Jim Halliday was based on a factor other than sex.

All of Gulfport's City Prosecutors, male and female, have been paid less than the Assistant City Attorney. In fact, all of the male City Prosecutors have been paid less than petitioner for doing the *same* City Prosecutor work. Petitioner claims, nonetheless, that the City violated the Equal Pay Act by failing to pay her as much as the Assistant City Attorney. Exh. A, Golden depos, Supp. Record 31, 32.

Petitioner was the first full-time prosecutor for the City of Gulfport. Before she was hired, the work of the prosecutor's office was handled by part-time prosecutors. The three part-time prosecutors who were on board when she was hired, and who had been responsible for all of the functions she performed after she was hired, were Wes Teel, Jim Simpson, and Mark Strickland. Mr. Teel, who as Senior Prosecutor handled scheduling and other administrative functions for the prosecutors, was paid $750.00 semi-monthly for a twenty hour

workweek. Jim Simpson and Mark Strickland were paid $500.00 semimonthly for a twenty hour workweek.[1] Teel Affid., Record 529-530; Exh. D-1, Employment Histories, Supp. Record 123-131.

Before petitioner was hired, the prosecutors' workload had increased to the point that they were working twenty-five to twenty-eight hours per week. None of the prosecutors was given any secretarial support by the City; they provided their own, at their own expense. They were eligible for no fringe benefits except retirement. Teel Affid., Record 529-530; Hewes Affid. Record 533-535.

Petitioner was hired effective February 16, 1993 at $1475.52 semimonthly. Her fringe benefits included retirement eligibility, plus paid vacations, holidays, and sick leave, and medical and life insurance. She generally worked a forty hour workweek, from 8:00 to 5:00, Monday through Friday. Exh. A, Golden depos, Supp. Record 23, 26, 38; Hewes Affid., Record 533-535; Exh. D-1, Employment Histories, Supp. Record 123-131. She was paid more than twice as much, not even counting fringe benefits, as the three male prosecutors who had performed the functions she assumed when she was hired, even though her hours were less than twice what the part time prosecutors had devoted to the job.

After petitioner was hired, the backlog of cases was such that two of the part-time prosecutors, Wes Teel and Jim Simpson, continued to work at least twenty hours per week throughout her employment, and were paid $625.00

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[1]. Mr. Simpson's pay was temporarily raised to $1238.63 semi monthly when he filled in for Jim Halliday during his illness.

semimonthly, still with no fringe benefits. Teel affid., Record 529-530; Exhibit D-1, Employment Histories, Supp. Record 123-131. Accordingly, while petitioner's workweek was approximately twice theirs, she was paid more than twice as much. With her hire, the City's total cost for prosecutor salaries rose from $1750 semimonthly to $2725 semimonthly, not counting fringe benefits, plus the salary of petitioner's secretary.

After petitioner was discharged, the work that had been done by petitioner, Mr. Teel and Mr. Simpson was performed by Mr. Teel and Mr. Simpson, with the temporary assistance of a third part-time prosecutor, William Bethea. Teel Affid., Record 529-530. The salaries of Mr. Teel and Mr. Simpson were raised from $625 to $1000 semimonthly (a raise of $375), and Mr. Bethea was paid $625.00 semimonthly. Exh. D-1, Employment Histories, Supp. Record 123-131. While petitioner had been paid $1476 semimonthly, the raises given to the two part-time prosecutors to pick up her duties, plus the salary of the additional part-time prosecutor hired for this period, came to only $1375, and she was paid fringe benefits while they were not. The total cost of prosecutor salaries, which had been $2725 semimonthly plus fringes, dropped to $2625 semimonthly without fringes when assumed by three male part-time prosecutors. This cost dropped even though the prosecutors faced a backlog of cases due to Judge Gaston Hewes' recusal and Judge Danny Guice's illness, and an influx of cases due to the Orange Grove annexation to the City of Gulfport.

When Steve Miller was hired to replace petitioner as full-time prosecutor, he was paid $1405.05 semimonthly, lower than petitioner's $1475.52 rate. Exh. D-1, Employment Histories, Supp. Record 123-131.

Petitioner asserts that "Jim Simpson, a part-time prosecutor received a salary of $24,000." She fails to mention that Mr. Simpson's salary was raised to this amount during the period when petitioner had been terminated and Mr. Simpson, among others, assumed her duties. After petitioner was discharged, the work that had been done by petitioner, Mr. Teel and Mr. Simpson was performed by Mr. Teel and Mr. Simpson, with the temporary assistance of a third part-time prosecutor, William Bethea. Teel Affid., Record 529-530, These part-time prosecutors had to cover the work they had been doing while petitioner was employed, plus her work. The workload was further inflated by a backlog of cases due to Judge Gaston Hewes' recusal and Judge Danny Guice's illness, and an influx of cases due to the Orange Grove annexation to the City of Gulfport. As a result the hours put in by these part-time prosecutors, who had worked at least twenty hours per week while petitioner was employed, returned to the levels they had worked before she was hired - about 25 - 28 hours per week. Teel Affid., Record 529-530. When petitioner was terminated, the salaries of Mr. Teel and Mr. Simpson were raised from $625 to $1000 semimonthly (a raise of $375), and Mr. Bethea was paid $625.00 semimonthly. While petitioner had been paid $1476 semimonthly, the raises given to the two part-time prosecutors to pick up her duties, plus the salary of the additional part-time prosecutor hired for this period, came to only $1375, and she was paid fringe benefits while they were not. Exhibit D-1, Employment Histories, Supp. Record 123-131. The total cost of prosecutor salaries, which had been $2725 semimonthly plus fringes, dropped to $2625 semimonthly without fringes when assumed by three male part-time prosecutors.

Petitioner cites *Flory v. Salt Lake County Sheriff's*

Office, 680 F. Supp. 1504 (D. Utah 1988) in a discussion of the "merit system" defense, but respondents summary judgment motion did not rely on a merit system defense. The only reference petitioner makes to the defense at issue - factor other than sex - is to cite the fact that Jim Halliday made $24,000 per year as a part time prosecutor. She fails to mention that Mr. Halliday became a part-time prosecutor in July, 1995, when he replaced Jim Simpson in that job. This was a full two years after petitioner's termination, and it is not valid to assume that pay levels would remain static, even if work loads had remained the same. For example, Steve Miller, who replaced petitioner, had received two raises by that time, and Mr. Halliday four. Exhibit D-1, Employment Histories, Supp. Record 123-131. Comparisons such as the one petitioner wishes to make were rejected in *Brennan v. Victoria Bank and Trust Company*, 493 F.2d 896, 900 (5th Cir. 1974), explaining, "a meaningful comparison of the salaries paid the males and females, to say the least, is difficult because there was never more than one person at a time holding the exchange teller job. Consequently, the salaries sought to be compared existed at differing intervals of time, under varying price levels applicable at any particular point." *See also, Behrens Drug* at 1049 "the Equal Pay act applies to jobs held in *immediate* succession, as well as simultaneously" (emphasis added). Steve Miller, petitioner's immediate successor as full-time prosecutor, was hired at $1405.05 semimonthly, lower than petitioner's $1475.52 rate. Exh. D-1, Employment Histories, Supp. Record 123-131.

II. The Court of Appeals did not err in affirming summary judgment on petitioner's Title VII claim that she was terminated because of her race.

Respondent Harry Hewes, Gulfport City Attorney, was

petitioner's immediate supervisor. On August 23, 1993, Mr. Hewes issued a Notice of Termination that said, "Mrs. Golden is a probationary employee and has refused to accept assistance and to respond to counsel by the City Attorney to enable her to adequately perform the duties demanded of the full time Prosecuting Attorney for the City of Gulfport." An attached memorandum set out specifics. Hewes Affid., Record 610; Exhibit B-1, Notice of Termination with attached memoranda, Supp. Record 93-101. The record is replete with evidence of petitioner's poor performance, to which petitioner responded not by showing pretext but by arguing that she was right and everyone else wrong. For example, after receiving outraged complaints from a number of police officers that petitioner was negotiating plea bargains and dismissing cases without their input, Mr. Hewes issued an April 14, 1993 Memorandum Concerning the Work of the Prosecuting Attorneys' Division of the City Attorneys' Office. It said, "[e]ach of the present staff shall have equal decision-making authority in handling of cases to which they are assigned.... As full time prosecutor, the City Prosecuting Attorney shall be the administrator of the Prosecuting Attorneys' office. Matters of policy shall be discussed by all of the prosecutors, and upon recommendation shall be subject to final approval by the City Attorney. Exh. B-2, Supp. Record 102-106. Petitioner felt that Mr. Hewes, although her supervisor, had no authority to issue this directive; "[h]e didn't have such authority because I, as an attorney, am licensed by the State of Mississippi, which gives me independent professional judgment, that I was supposed to exercise my professional independent judgment, and no one should limit that authority." Exh. A, Golden Depos., Supp. Record 66. Petitioner thought Mr. Hewes should "cooperate with me and allow me to run the department. You know, that-- that was what I was hired to do, and he-- It appears every week he

would-- or every month when we met, he would come to me with some unfounded complaint from some disgruntled police officer, and I would give my explanation, and I thought it would be the end of it, and it was not." Exh. A., Golden Depos. Supp. Record 34.

Petitioner had the same attitude, and corresponding problems, with the Judges who presided over her cases. She said Judge Eric Geiss called her to his chambers after presiding over an evening of her trials, and admonished her, "Ms. Golden, we have some police officers who are very upset with you, and we cannot handle these cases like this, and I want you to explain to me what you did." She responded, "Judge, if there is anything you would like to say to me, please see me in the morning privately because I am not going to tolerate a verbal lynching," and she left; Exh. A, Golden Depos., Supp. Record 39-40. Petitioner also testified, "Judge Geiss came to me. He said, you know, 'Can you just bring - start bringing all your cases before me and not dismiss any cases? Don't dismiss any cases.' And my response to him was 'Well, Judge, I don't dismiss cases. I don't have that authority to dismiss cases. You dismiss cases.' And that was the end of that conversation." Exh. A, Golden Depos., Supp. Record 60.

Petitioner testified that Judge Gaston Hewes expected her to submit court orders the next day after a jury trial, and she described her response:

> So I told Judge Hewes, I said, "Well, Judge, you know, as long as I get the court orders to you prior to the expiration of the court term, you know, I'm not in violation of any law. Can you explain to me why you want these orders the very next day when I have jury

trials scheduled day after day after day?"

Exh. A, Golden Depos., Supp. Record 61.

Petitioner produced no evidence that the reasons given for her termination were pretexts for race discrimination. She cites a July, 1993 letter from respondent Mayor Combs. The fact that Mayor Combs at one point complimented petitioner's performance does not make it discriminatory for him subsequently to determine that it was unsatisfactory. *See, e.g., Billet v. Cigna Corp.*, 940 F.2d 812, 826 (3rd Cir. 1991) ("... prior good evaluations alone cannot establish that later unsatisfactory evaluations are pretextual"); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 528 (3rd Cir. 1992) ("Pretext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations"). In fact, since petitioner was African-American and female when the Mayor complimented her performance, his compliment is strong evidence that some factor *other* than race or sex was the basis for his later determination that her performance was unsatisfactory.

Petitioner also cites her own compilation of her court record. Even assuming the accuracy of her compilation, however, it proves nothing without evidence that it met respondents' expectations in the areas cited in her Notice of Termination. For example, the compilation does not address the concern cited in her Notice of Termination that the "rate of convictions, especially in DUI cases has reduced drastically during the period in which Mrs. Golden has served as Prosecutor." It makes no comparison of conviction rates. Although the Notice of Termination cited her for her continuing

propensity to "plea bargain DUI cases without thorough input from and over the objection of the police officers involved," petitioner's compilation does not distinguish between guilty pleas and guilty verdicts. It does not show how many guilty pleas were made as part of a plea bargain, what the plea bargain was, or whether the plea bargain was made with the input of the police officers involved. Since petitioner's compilation offers no comparison of her own performance to that of other prosecutors, it is irrelevant to the issue of whether she was treated differently from them because of her race or sex.

Petitioner complains that her supervisor never observed her in court and terminated her based upon hearsay. Respondents' evidence of petitioner's poor performance, however, is offered to articulate their motivation in discharging petitioner, not to prove the truth of the matters asserted; *see, e.g., Wallace v. Tech University*, 80 F.3d 1042, 1048, n.4 (5th Cir. 1996) ("Dickey's affidavit alleges specific instances of Wallace's refusals to follow directions and his questioning of Dickey's judgment. Wallace attacks Dickey's affidavit as being improperly based on hearsay. Although some of Dickey's specific examples may not be based on his personal knowledge of the events, Dickey does not offer those incidents for the truth of the events, but rather, he offers his belief that these incidents occurred as proof of his motive for failing to renew Wallace's contract. Accordingly, those statements are not hearsay. *See* Fed.R.Evid. 801(c)"). Employers are not required to manage their workforce in accordance with the Federal Rules of Evidence. *See, e.g., Waters v. Churchill*, 511 US , 128 L. Ed. 2d 686, 700 (1994)("[E]mployers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the

most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay").

In any event, many of the deficiencies Mr. Hewes cited in the Notice of Termination (Exh. B-1, Supp. Record 93-101) were based on or corroborated by his own personal observations. For example, the Notice said, "Mrs. Golden is a probationary employee and has refused to accept assistance and to respond to counsel by the City Attorney to enable her to adequately perform the duties demanded of the full time Prosecuting Attorney for the City of Gulfport."[2] The Notice also cites the incident in which petitioner refused to obey an order from a County Court Judge to appear in court, an incident in which Mr. Hewes was forced to become personally involved: "On one occasion she refused to appear in Court when requested by the Judge to appear, and only appeared reluctantly after being ordered to appear by the undersigned as her Supervisor. This lack of submission to authority in my opinion reflects badly on the City of Gulfport, and creates an atmosphere with the Court and her superiors that affects her ability to perform her duties for the City of Gulfport." When

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[2]. Mr. Hewes' observation in this respect is emphatically corroborated by plaintiff's own deposition testimony; she did not, and does not, accept counseling.

this Judge subsequently recused himself from all cases handled by petitioner, Mr. Hewes did not need hearsay to assess the consequences, since this Judge was the only one available to hear the City's cases in County Court at the time.

Petitioner complains that she "never received any derogatory evaluations indicating that her performance was unsatisfactory." She cites nothing in the respondent City's policies or practice that requires evaluations on probationary employees such as herself, and she offers no evidence to link respondents' alleged failure to evaluate her to her race. Moreover, her performance was assessed in Harry Hewes' August 23, 1993 Memorandum to Personnel Department Hewes Affid., Record 610; Exh. B-1, Notice of Termination with attached memoranda, Supp. Record 114. It was in fact Mr. Hewes' assessment of her performance that precipitated her termination. Petitioner was well aware of Mr. Hewes' dissatisfaction with her performance; she testified in her deposition that "every week he would - or every month when we met, he would come to me with some unfounded complaint from disgruntled police officer, and I would give my explanation, and I thought it would be the end of it, and it was not." Exh. A, Golden Depos., Supp. Record 34. She continued, "during our monthly meetings, Harry would tell me, 'Well, this police officer is upset for what you did.'" Exh. A, Golden Depos., Supp. Record 37. She complained that Mr. Hewes held her responsible for a case that was dismissed because discovery had not been answered. Exh. A, Golden Depos., Supp. Record 36. The only "commendations and high praises from Respondent Combs" cited by petitioner is his July 26 letter, discussed above. Moreover, Mayor Combs was not respondent's immediate supervisor and not responsible for evaluating her performance; Harry Hewes was.

Petitioner cites an evaluation done on James Halliday for the year 1994. To establish disparate treatment, petitioner "must show that white employees were treated differently under circumstances 'nearly identical'" to hers; *Mayberry v. Vought Aircraft Company*, 55 F.3d 1086, 1090 (5th Cir. 1995); *see also, Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 96, 97 (5th Cir. 1991)("To establish a claim of disparate treatment, Little must show that Republic gave preferential treatment to a younger employee under "nearly identical" circumstances"); *Smith v. Wal-Mart Stores, Inc.*, 891 F.2d 1177, 1180 (5th Cir. 1990)("In order for her claim of disparate treatment to succeed under Title VII, Smith would have to show that Cudd and she had been similarly situated. [T]o this end Smith's burden is to show 'that the misconduct for which she was discharged was nearly identical to that engaged in by a male employee whom [the company] retained'").

One reason petitioner cannot show that Jim Halliday was treated differently under "nearly identical" circumstances is that she was a probationary employee, while he was not. The City's employee handbook, a copy of which is supplied to all employees when they are hired, notifies new employees of their probationary status and what that entails; Record 633-636, Employee Handbook. Petitioner signed an "Acknowledgment of Employment Conditions," Record 638, acknowledging her probationary status and its ramifications. Jim Halliday, hired in 1990, was long out of his probationary period. Exhibit D-1, Employment Histories, Supp. Record 123-131. This in itself precludes petitioner from establishing that she was similarly situated to Mr. Halliday. *See, e.g., Cooper v. City of North Olmstead*, 795 F.2d 1265, 1270-71 (6th Cir. 1986) ("A probationary period of employment permits a company to weed out or eliminate undesirable employees. ... Probationary bus

drivers therefore do not stand on equal footing with permanent drivers, and cannot be considered to be similarly situated"). It is not respondents' burden to show that Mr. Halliday was not similarly situated to petitioner; under the cases cited *supra* it is petitioner's burden to show that they were. Petitioner makes no attempt whatever to do so; she simply submits his evaluation and notes that he was not terminated. Mr. Halliday's evaluation cannot carry petitioner's burden. Petitioner's Notice of Termination (Exhibit B-1, Record 93-101) cited examples of a "growing inability" to handle her cases and "numerous complaints concerning ineptness in presentation of facts and law before the Court by the Prosecutor on both the City and County Court levels." Mr. Halliday's evaluation specifically acknowledged that Mr. Halliday had "the ability, skills, knowledge and experience to attain a high level of performance as Assistant City Attorney," and gave him a standard rating in four of five categories - knowledge, utilization of time, initiative and judgment, and quality of work. While petitioner's Notice noted that the "rate of convictions, especially in DUI cases, has reduced drastically during the period in which Mrs. Golden has served as Prosecutor," Mr. Halliday's Evaluation indicates no problem with the outcome of his cases. Petitioner's Notice said that she "continues to plea bargain DUI cases without thorough input from and over the objection of the police officers involved", and that her ability to "communicate with the police officers involved was never satisfactory, and now has broken down to the point where Judge Geiss, Municipal Judge is unable to hear cases timely, and has found it necessary to continue cases that he deemed too serious to dismiss or reduce due to the failure or inability of the Prosecutor to properly prosecute the cases. The morale of the Police Department and the administration of justice in the Gulfport Municipal Court has been severely affected." Mr. Halliday's evaluation cites no such

problem in his relationship with any of the departments he served, much less a problem of such severity as to affect the administration of justice. Petitioner's Notice cited complaints that petitioner showed "lack of respect for the Court" and the fact that due to a conflict with petitioner, the only judge available to hear the City's cases in County Court had recused himself. Mr. Halliday's Evaluation cites no such crisis.

Mr. Halliday's rating gave him a below standard rating in only one category out of five: "punctuality/attendance, dependability & cooperation," and called for "a change of priorities and work habits." If that criticism was sufficient on its face to make him similarly situated to petitioner, then *any* criticism would suffice, and to be nondiscriminatory *any* criticism of a white or male employee would have to result in his termination. That is not the law; *see, e.g., Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 531 (3rd Cir. 1992) ("A plaintiff does not establish pretext, however, by pointing to criticisms of members of the non-protected class, or commendation of the plaintiff, in categories the respondent says it did not rely upon in denying promotion to a member of the protected class").

CONCLUSION

Plaintiff has suggested no way in which the Court of Appeals has deviated from established law, and no conflict among the circuits on any issue presented by her petition. She has shown no error by the Court of Appeals. Accordingly, her Petition for Certiori should be rejected, with costs assessed against her.

Respectfully submitted,

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